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January 4, 2013

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

RE: Applications of Comcast Corporation, General Electric
Company, and NBC Universal, Inc. for Consent to
Assign Licenses and Transfer Control of Licensees,
MB Docket No. 10-56
Notice of *Ex Parte* Communications

Dear Ms. Dortch:

On January 2, 2013, Anne Lucey of CBS Corporation, Jared Sher of News Corporation, Susan Mort of Time Warner Inc., Keith Murphy of Viacom Inc., Susan Fox of The Walt Disney Company, and Antoinette Cook Bush and the undersigned of this firm (the "Content Company Representatives"), met with Bill Lake, Martha Heller, and Jessica Campbell of the Media Bureau and Sean Lev, Marilyn Sonn, Royce Sherlock, Neil Dellar, Virginia Metallo, Jim Bird, and Jennifer Tatel of the Office of General Counsel. In a separate meeting on January 2, the Content Company Representatives (without Ms. Fox) met with Elizabeth Andrion and Lyle Elder of Chairman Genachowski's office.

In both of these meetings we discussed the "Request for Stay of Media Bureau Order DA 12-1950" that CBS Corporation, News Corporation, Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company filed on December 18, 2012 and the "Application for Review" of that order that they filed on January 3, 2013. These "Content Companies" have requested an immediate

stay and Commission review of the Order issued by the Media Bureau on December 4 in the above-cited proceeding.¹ That Order modified the Commission's decision granting its consent to the joint venture of Comcast Corporation and NBC Universal, Inc. ("C-NBCU").² The Merger Decision imposed a number of conditions on C-NBCU, including the "Benchmark Condition" which requires C-NBCU to provide programming to qualified Online Video Distributors ("OVDs") at prices, terms, and conditions that are the economic equivalent of what the OVD pays for "Comparable Programming" from a "Peer Programmer." The Content Companies are Peer Programmers. As requested by C-NBCU, the Order requires an OVD to disclose peer programming contracts containing highly confidential information of the Content Companies at the time when the OVD first invokes the Benchmark Condition, notwithstanding confidentiality and non-disclosure provisions and agreements between the OVD and the Content Companies.

The Content Companies noted that this requirement is not a "clarification" of the Merger Decision. It dramatically alters the negotiation process that the Commission devised for use with the Benchmark Condition. In addition to requiring disclosure of highly confidential information at an early date – before the commencement of negotiations – the Order makes it extremely less likely that OVDs and C-NBCU will actually conduct meaningful negotiations. With details of the peer programming agreement available, C-NBCU will merely match the peer programmer's price for OVD programming. Thus the Order is likely to increase the number of peer programming agreements that must be disclosed. The C-NBCU agents, to whom the Order gives access to the Content Companies' highly confidential agreements, will amass a body of information about the OVD programming marketplace that will exceed that of any of the Content Companies. Consequently, a provision in the Merger Order that was intended as a limit on C-NBCU's competitive advantages actually *benefits* C-NBCU.

We explained that C-NBCU had requested relief that also runs counter to the requirements of the Department of Justice's Final Judgment, which ordinarily defers to the Commission's process, but has its own rules for arbitration that specify

¹ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, DA 12-1950, 2012 WL 6039368 (Order by the Chief, Media Bureau, released December 4, 2012). (the "Order").

² *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, MB Docket No. 10-56, 26 FCC Rcd 4238 (January 20, 2011) (the "Merger Decision").

providing peer programming agreements only in arbitration, after obtaining the DOJ's consent.³

The Content Companies pointed out that C-NBCU did not demonstrate any actual need for the modification, but, in fact, has reported successful negotiations with OVDs who had invoked the Benchmark Condition without disclosing confidential information.⁴ Moreover, the Order radically modifies the Commission's Merger Decision without authority. Delegated authority under Section 310(d), as cited by C-NBCU, does not extend so far as to justify Commission interference with the business interests of companies that were *not* applicants in license transfer and assignment applications and did not consent to the interference.⁵

In response to questions from Commission staff, the Content Company Representatives noted that no amount of "tweaking" the "Third Protective Order"⁶ in this matter could ever remedy the harm to the business interests of the Content Companies or the disruption to the market for OVD programming that the Order will cause.

We pointed out that on December 19, 2012, Public Knowledge filed in support of the Content Companies' request for stay. Public Knowledge recognized that the Content Companies had reason to be alarmed that one of their competitors, C-NBCU, might be given access to their proprietary commercial information. Furthermore, Public Knowledge agreed that the Order brings about the opposite of the Benchmark Condition's intended result and would interfere with the acquisition of programming by OVDs.

³ Final Judgment, *U.S. v. Comcast Corp.*, Case No. 1:11-cv-00106 (D.D.C. Sept. 1, 2011) at 25, available at <http://www.justice.gov/atr/cases/comcast.html>.

⁴ *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc.*, Annual Report of Compliance with Transaction Conditions (filed Feb. 28, 2012), at 8-9.

⁵ *See, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547 (2001) ¶ 60 (explaining that the Commission's authority under Section 310(d) to review the impact of a transaction on the public interest goes hand in hand with the authority to attach conditions to the proposed transfer of lines and licenses pursuant to Sections 214(c) and 303(r)). The Content Companies were not applicants and did not acquire lines or licenses as part of the C-NBCU joint venture.

⁶ "Third Protective Order for Compliance," DA-1950, pp. 14 *et seq.* (released with the Order, December 4, 2012).

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The Request for Stay and Application for Review each includes a comprehensive statement of the position of the Content Companies. Their representatives would be happy to answer any questions regarding these issues.

Sincerely,

/s/

David H. Pawlik

cc: Bill Lake
Martha Heller
Jessica Campbell
Sean Lev
Marilyn Sonn
Royce Sherlock
Neil Dellar
Virginia Metallo
Jim Bird
Jennifer Tatel
Elizabeth Andrion
Lyle Elder